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Filing date: **09/11/2012**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92053501
Party	Plaintiff Christian M. Ziebarth
Correspondence Address	RICHARD F CHRISTESEN 6905 S 1300 E #233 MIDVALE, UT 84047-1817 UNITED STATES rchristesen_now@yahoo.com, trademark.vgt@gmail.com
Submission	Opposition/Response to Motion
Filer's Name	Richard F. Christesen
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Signature	/Richard Christesen/
Date	09/11/2012
Attachments	Opposition to Motion for Sanctions.pdf (13 pages)(403320 bytes) Exhibit A to Opposition to Motion for Sanctions.pdf (10 pages)(266387 bytes) Exhibit B to Opposition to Motion for Sanctions.pdf (9 pages)(262001 bytes)

Christian M. Ziebarth,	:	
an individual residing in California,	:	Cancellation No. 92053501
Petitioner,	:	
	:	
	:	
v.	:	
	:	
Del Taco, LLC	:	
a California limited liability company,	:	
Respondent.	:	
	:	

Applicant and Petitioner Christian M. Ziebarth (“Ziebarth” or “Petitioner”) hereby submits his opposition to Respondent Del Taco LLC’s (“Del Taco” or “Respondent”) Motion for Sanctions filed on August 22, 2012. Petitioner denies any willful or deliberate refusal to obey the Board’s Order dated January 21, 2012 and asserts that he filed adequate responses to discovery. Petitioner further asserts that he has standing to support this cancellation and that he has a bona fide intent to use the subject “NAUGLES” mark in connection with the services stated in Application Serial No. 85/040746 filed on May 17, 2010.

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BRIEF IN OPPOSITION

I. PETITIONER HAS STANDING TO BRING AND MAINTAIN THIS CANCELLATION ACTION

“Any person who believes that he, she or it is or will be damaged by a registration may file a petition, addressed to the Trademark Trial and Appeal Board, for cancellation of the registration in whole or in part.” 37 CFR § 2.111(b). In *ShutEmDown Sports Inc. v. Lacy*, 102 USPQ2d 1036, 1041 (TTAB 2012), standing was supported by evidence of record showing petitioner's pending application was refused registration based on respondent's registration.

However, there is no requirement that actual damage be pleaded or proved, or that plaintiff show a personal interest in the proceeding different or “beyond that of the general public in order to establish standing or to prevail in an opposition or cancellation proceeding.” See Trademark Board Manual of Procedure (“TBMP”) §§ 303.03 and 309.03 (b) (2d ed. rev. 2004). To demonstrate a "real interest" in the case, opposer must allege a “direct and personal stake” in the outcome of the proceeding, and the allegations in support of its belief of damage must have a reasonable basis in fact. See *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1026-1027 (Fed. Cir. 1999).

Petitioner Ziebarth has standing to both bring and maintain this cancellation proceeding. Petitioner filed an application alleging a bona fide intent to use the NAUGLES mark. This application was later refused registration citing the Respondent's registration. Pursuant to the TBMP § 309.03(b), said application and refusal is sufficient to show standing to bring a cancellation action.

Moreover, Petitioner's actions prior to and after filing his application demonstrate that he has standing to maintain this cancellation proceeding until a final determination by the Board. Petitioner has alleged and shown through his actions and responses to discovery that he has a direct and personal stake in the outcome of the proceeding and a reasonable basis in fact that he will be damaged by Respondent's registration.

Respondent argues in its Motion for Sanctions ("Motion") that "Petitioner must prove its standing as a threshold matter in order to be heard on its substantive claims . . . [d]espite this, Petitioner has willfully refused to comply with the Board Order by submitting intentionally evasive, inconsistent, improper, and irrelevant responses, as well as deliberately withholding relevant documents and information from production." (See TTABVUE Filing #29, pg. 7, Para. 2.) Petitioner's supplemental responses to discovery clearly refute this argument.

Specifically, Petitioner provided the following response in Interrogatory Nos. 1-2 and others where relevant:

"Since 2009, Petitioner has engaged in extensive research on reviving the Naugles chain, including meeting with attorneys regarding adopting and using the Naugles trademark, meeting with Del Tacos' PR Representative Barbara Caruso, APR Caruso Communications in or around September 2009 to discuss reviving the brand, partnering with Jeff Naugle and engaging in discussions with other Naugle family members regarding the brand, recreating and testing original Naugles menu items, marketing and surveying revival of Naugles Restaurant through online blogs, facebook and Twitter pages and securing the domain name "nauglestacos.com." Moreover, Petitioner has scouted potential locations for restaurants and met with potential investors and restaurant consultants."

Respondent has been made aware of these actions and Petitioner's intention to revive the Naugles brand since 2009, in response to discovery, and throughout his communications with Respondent. Petitioner clearly stated facts and provided evidence in support of his bona fide intent to open restaurants under the NAUGLES mark in the Opposition to the Motion to Compel filed by the Respondent. See TTABVUE Filing #14, pages 4-6, 23-50. In addition, Petitioner produced documents in support of the above response, such as a calendar note, a copy of the confirmation of his purchase of the domain name "nauglestacos.com", copies of email communications with Naugle family members and potential investors, copies of documents received from Del Taco to support its claim of non-use, and news articles. (See TTABVUE Filing #29, pages 15-19).

To continue to question whether Petitioner has a bona fide intent to use the NAUGLES mark is without merit and only meant to harass Petitioner and delay the Board's ruling on the Petitioner's substantive claims. Petitioner neither deliberately ignored the Board's Order nor willfully withheld any information from Respondent. Petitioner merely repeated the objections to each discovery request in order to preserve its rights to object, but provided substantive answers to each request. Petitioner answered each of the discovery requests ordered by the Board to the best of his ability based on the information and documents in his possession at the time the responses were due, subject to the excusable neglect outlined below in Section II.

**B. PETITIONER IS NOT REQUIRED TO SHOW ACTUAL USE TO HAVE
STANDING TO HAVE THE BOARD HEAR AND RULE ON HIS SUBSTANTIVE
CLAIMS**

Many of the questions asked by Respondent in their discovery requests related to “actual use” rather than to an intent to use. Actual use is not a prerequisite to standing or to the Board ruling on a cancellation proceeding. For example, in Document Request No. 25, Respondent asks:

All documents and things, including but not limited to, plans, specifications, proposals, correspondence and memoranda, and samples that refer to the design, specifications, packaging, locations, recipes, format, and ingredients for Petitioner’s NAUGLES Products.

See TTABVUE Filing #29, page 63. As stated above, the test for bringing a cancellation proceeding is twofold, 1) petitioner must have a “direct and personal stake” in the outcome of the proceeding, and 2) the allegations in support of its belief of damage must have a reasonable basis in fact. See *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1026-1027 (Fed. Cir. 1999).

Petitioner’s responses to discovery meet both parts of this test. Securing the right to the NAUGLES mark is a first step in Petitioner’s overall plan to open restaurants under the mark. Respondent argues that Petitioner’s responses were incomplete, willfully evasive and that the document production was woefully deficient or irrelevant to support a bona fide intent to use the mark. Petitioner categorically denies this argument.

Respondent appears to expect petitioner to have worked out every detail of his use of the mark in order to show that he has a bona fide intent to use the mark, but many of the plans to use the NAUGLES mark are contingent upon Petitioner’s rights to the NAUGLES mark and ultimate ownership of a federal trademark registration for the mark. This determination cannot be made without the Board hearing and ruling on the substantive claims in this cancellation proceeding, namely, whether Del Taco abandoned the NAUGLES mark and whether Del Taco

committed a fraud on the Trademark Office in its renewal of the NAUGLES registration in 2004.

Petitioner's supplemental responses to the subject discovery requests were genuine and not meant to evade any response to the admissions, questions and documents requested. Petitioner filed an intent to use application as a first step in clearing the right to use the NAUGLES mark. After consulting with trademark counsel, Petitioner was advised that Del Taco's lack of use of the NAUGLES mark for restaurant services for over three years was evidence of an intent to abandon the mark and was advised that Del Taco's specimen submitted in its renewal raised questions as to their actual use of the NAUGLES mark. Petitioner has pursued since 2009 and continues to pursue revival of the NAUGLES brand and to open Naugles restaurants. He has a direct and personal stake in the outcome of this proceeding and has a reasonable factual basis that he will be damaged.

Petitioner repeatedly informed counsel for Del Taco of his intent to open restaurants under the NAUGLES mark through his responses to discovery and through settlement negotiations with counsel for Petitioner. To question whether or not Petitioner had a bona fide intent at any time before the filing of Petitioner's trademark application or any time after the institution of this cancellation proceeding is without merit.

II. ANY DEFICIENCIES IN PETITIONER'S SUPPLEMENTAL RESPONSES TO DISCOVERY ARE A RESULT OF EXCUSABLE NEGLIGENCE AND ARE HARMLESS ERROR

Rule 6 of the Federal Rules of Civil Procedure states:

"When an act may or must be done within a specified time, the court may, for good cause, extend the time:

. . . . (B) on motion made after the time has expired if the party failed to act because of excusable neglect. (Fed. R. Civ. P. 6(b)(1)(B))”

Rule 61. Harmless Error

“Unless justice requires otherwise, no error in admitting or excluding evidence—or any other error by the court or a party—is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party’s substantial rights.

A. RESPONDENT’S INITIAL DISCOVERY REQUESTS WERE SERVED VIA EMAIL

Respondent states that the “parties had never agreed to service via email nor had Petitioner requested particular permission from Del Taco for such service.” See TTABVUE Filing #29, pg. 5, paragraph 1. Yet the Respondent served its discovery requests via email on or about April 20, 2011. (See Exhibits A and B, last page, attached hereto), therefore, it appeared that the parties had agreed to service via email communication. Counsel for Petitioner appeared as counsel on February 17, 2012. See TTABVUE Filing #20. Counsel had received limited documents from prior counsel. Petitioner’s supplemental responses were emailed to counsel for Respondent on Wednesday, Mar 14, 2012 in accordance with the date ordered by the Board. See TTABVUE Filing #22. In addition, in telephone conversations with counsel for Petitioner, Ms. Besl acknowledged receipt of the Petitioner’s discovery responses.

B. PETITIONER PRODUCED DOCUMENTS IN ACCORDANCE WITH RULE 34 OF THE FEDERAL RULES OF CIVIL PROCEDURE

Federal Rule of Civil Procedure, Rule 34(b) provides,

“The party upon whom the request is served shall serve a written response within 30 days after the service of the request. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties, subject to Rule 29. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, including an objection to the requested form or forms for producing electronically stored information, stating the reasons for the objection.” (See Fed. R. Civ. P. 34(b)(2)(E)(i)).

As stated above, Petitioner served a written response to the demand for production of document and things via email on March 16, 2012. Petitioner informed counsel for Respondent that it would submit documents in response to the discovery request under separate cover. The documents were emailed on Friday evening, March 16, 2012. Respondent’s Demand for Production only stated that the documents be produced at counsel’s address. (See Exhibit A attached hereto). No other specific instructions were given regarding the manner of production. Given the Respondent’s prior service by email and the service of Petitioner’s written responses within the time set by the Board and given the fact that Petitioner informed counsel for Respondent that documents would be sent separately, Petitioner had a good faith belief that he had properly served his supplemental responses. In addition, counsel for Petitioner had computer and scanning difficulties which resulted in a delay in preparing the documents to produce to Respondent.

Should the Board find that Petitioner’s supplemental responses or that the documents were produced after the allotted time or erroneously served by email, Petitioner requests that

the Board find that petitioner acted with excusable neglect and deny Respondent's request for sanctions.

Moreover, any error in service via email or service of the documents after the March 14, 2012 deadline is harmless error in accordance with Rule 61 of the Federal Rules of Civil Procedure. Respondent's counsel informed counsel for Petitioner that she received the supplemental responses and documents. Respondent's counsel received the responses and documents via email sooner than she would have received these supplemental responses if they were served via U.S. mail. Respondent has not suffered any detriment to its substantial rights as a result.

C. PETITIONER WILL PROVIDE SUPPLEMENTAL RESPONSES TO ITS DISCOVERY
RESPONSES PURSUANT TO RULE 26 OF THE FEDERAL RULES OF CIVIL
PROCEDURE

Rule 26(e)(1)(A) of the Federal Rules of Civil Procedure provide that:

“A party who has made a disclosure under Rule 26(a)—or who has responded to an interrogatory, request for production, or request for admission—must supplement or correct its disclosure or response: (A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing;”

1. Request for Admissions

Counsel for the Petitioner carefully reviewed its supplemental responses to Respondent's Request for Admissions, Set One and determined that said responses were erroneously answered as if the requests were stated in the affirmative. Respondent's Request for Interrogatories were posed in

the affirmative and petitioner misread the Request for Admissions also to be posed in the affirmative, rather than in the negative, consequently a majority of the admissions were denied in supposed error. However, Petitioner continues to have misgivings and confusion when a majority of the Request for Admissions are stated in the negative rather than the affirmative so that responses must be stated in the affirmative in order to imply the negative. Thus, in accordance with Rule 26(e)(1)(A), Petitioner will provide supplemental responses to its further responses to Request for Admissions Set One to address the confusion resulting from the negative statements for admissions by Respondent.

2. Request for Interrogatories and Production of Documents and Things

Respondent states in their Motion for Sanctions, page 5, that “Petitioner offered and produced two new documents to Del Taco for consideration in the discussions” and that “[t]hese documents were not included in the documents that Petitioner ultimately produced pursuant to the Board Order.” See TTABVUE Filing #29, pg 5, paragraph 2. These two documents were not in existence at the time Petitioner served his supplemental responses on March 14 & 16, 2012 and were created as a result of the Respondent’s express request for said documents during settlement negotiations.

Moreover since Respondent has already received these two documents, Rule 26 does not require Petitioner to provide them a second time, even though

Petitioner will do so in its supplemental responses. Rule 26 provides that a party must supplement its response “*if* the additional or corrective information has not *otherwise* been made known to the other parties during the discovery process or in writing.” Fed. R. Civ. Proc. Rule 26(e)(1)(A), *emphasis added*.

Respondent Del Taco was made aware of these documents in writing and at their requests. To now characterize this disclosure as an attempt by Petitioner to willfully provide evasive or incomplete answers is evidence of Respondent’s attempt to harass Petitioner and avoid resolving this cancellation on the substantive issues that Del Taco abandoned the NAUGLES mark and submitted a questionable specimen when they renewed their trademark.

In accordance with Rule 26(e)(1)(A), Petitioner will provide supplemental responses to its further responses to Respondent’s Request for Interrogatories and Production of Documents and Things, Set One, including a privilege log where relevant, as well as further responses to Request for Admissions Set One as stated above.

III. PETITIONER HAS NOT ENGAGED IN DELAY TACTICS IN RESPONDING TO RESPONDENT’S DISCOVERY REQUESTS

Counsel for Petitioner appeared as counsel as of February 17, 2012 and was not privy to the basis for the extensions requested by Petitioner and Respondent. See TTABVUE Filing #20.

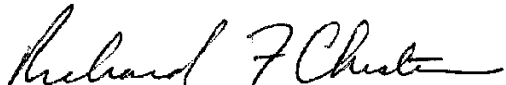
However based on the record in this case, Respondent's counsel consented to the discovery extension requests. See TTABVUE Filing ##s 5 & 7. On information and belief, Petitioner's former counsel alleged that their basis for objecting to the requested discovery was proper. See TTABVUE Filing #14, page 7. Current counsel for Petitioner did not engage in any delay tactics but provided supplemental answers following the Board ordered on January 21, 2012 that the Petitioner supplement its responses to certain discovery requests.

Petitioner should not be sanctioned as a result of its former counsel's requests for extensions, which were consented to by Respondent's counsel, or their arguing a reasonable basis for objecting to the Respondent's discovery requests on the grounds of relevance. Current counsel did not request any extensions to respond to the Board's Order and did not delay in providing supplemental responses to Respondent.

IV. CONCLUSION

For the reasons set forth above, Petitioner respectfully requests that the Board 1) deny Respondent's request for sanctions in its entirety, 2) find that the Petitioner has a bona fide intent to use the NAUGLES mark, and 3) that Petitioner has standing to proceed in this action and have the Board rule on Petitioner's substantive claims.

Dated: September 11, 2012

By: 
Richard F Christesen
6905 S 1300 E #233
MIDVALE, UT 84047-1817
801-983-3271 / 714-394-8394
801-260-2012 Fax

Attorneys for Petitioner

CERTIFICATE OF SERVICE

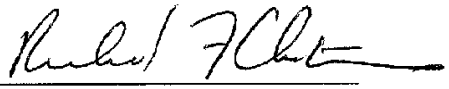
The undersigned hereby certifies that a copy of the aforementioned **PETITIONER CHRISTIAN M. ZIEBARTH'S OPPOSITION TO RESPONDENT DEL TACO LLC'S MOTION FOR SANCTIONS** was served upon Del Tacos, LLC's counsel by depositing one copy thereof in the United States mail, first-class postage prepaid on September 11, 2012 and addressed as follows:

April L. Besl, Esq.

DINSMORE & SHOHL, LLP

255 East Fifth Street

Cincinnati, OH 45202

By: 
Richard F Christesen
6905 S 1300 E #233
MIDVALE, UT 84047-1817
801-983-3271 / 714-394-8394
801-260-2012 Fax

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD

CHRISTIAN M. ZIEBARTH,

Petitioner,

vs.

DEL TACO LLC

Respondent.

Reg. No. 1,043,729
Cancellation No. 92053501

RESPONDENT'S FIRST SET
OF INTERROGATORIES AND REQUESTS FOR
PRODUCTION OF DOCUMENTS TO PETITIONER

In accordance with Rules 33 and 34 of the Federal Rules of Civil Procedure and Rule 2.116 of the Trademark Rules of Practice, Petitioner is called upon to fully respond to the document requests and interrogatories set forth below within thirty (30) days of the date of service. Applicant requests that all written responses and all responsive documents be produced at the offices of Dinsmore & Shohl LLP, 1900 Chemed Center, 255 East Fifth Street, Cincinnati, Ohio 45202.

DEFINITIONS

- A. As used herein, the term "Petitioner," "You" and "Your" includes the individual Christian M. Ziebarth and any of his employees, agents, and representatives thereof.
- B. As used herein, the term "Registrant" or "Del Taco" includes Del Taco LLC, its predecessors in interest, divisions, subsidiaries and related organizations, and the officers, directors, employees, agents and representatives thereof.
- C. As used herein, the term "the Petitioner's NAUGLES Mark" refers to the subject of Application Serial No. 85/040,746 in the name of Christian M. Ziebarth.

D. As used herein, the term “Petitioner’s NAUGLES Products” includes those products and services which Petitioner offers for sale or plans to offer for sale under the NAUGLES mark.

E. As used herein, “and” as well as “or” shall be construed disjunctively and conjunctively as necessary in order to bring within the scope of the request all documents which might otherwise be construed to be outside its scope.

F. As used herein, the singular shall include the plural and the present tense shall include the past tense and vice versa in order to bring within the scope of the request all documents which might otherwise be construed to be outside its scope.

INSTRUCTIONS

1. If Petitioner objects to the Interrogatories and Document Requests below based on a claim of privilege or a claim that such Interrogatories or Document Requests require the disclosure of attorney work product, state the nature of the privilege claimed and the nature of the information over which the privilege is claimed.

2. Every interrogatory herein shall be deemed a continuing interrogatory, and You are to supplement Your answers promptly, if and when You obtain relevant information in addition to, or in any way inconsistent with, Your initial answer to any such interrogatory.

3. If Petitioner is aware that a document or group of documents once existed but has been destroyed, this should be stated, and it should also be stated who destroyed it, why it was destroyed and the circumstances under which it was destroyed.

INTERROGATORIES

Interrogatory No. 1:

Describe in detail the nature of the present business of Petitioner in connection with Petitioner's NAUGLES Mark.

ANSWER:

Interrogatory No. 2:

Describe in detail all activities undertaken by Petitioner to utilize Petitioner's NAUGLES Mark prior to the filing of Petitioner's NAUGLES Mark with the United States Patent and Trademark Office.

ANSWER:

Interrogatory No. 3:

Identify each person with any information concerning Petitioner's selection of Petitioner's NAUGLES Mark.

ANSWER:

Interrogatory No. 4:

Describe in detail the circumstances under which Petitioner decided to select Petitioner's NAUGLES Mark for use in conjunction with Petitioner's business.

ANSWER:

Interrogatory No. 5:

Identify all products or services planned to be offered by Petitioner under Petitioner's NAUGLES Mark.

ANSWER:

Interrogatory No. 6:

Identify all transfers of rights in Petitioner's NAUGLES Mark granted by or to Petitioner.

ANSWER:

Interrogatory No. 7:

State whether Petitioner's NAUGLES Products are currently offered to the public.

ANSWER:

Interrogatory No. 8:

Identify the territorial areas in the United States where Petitioner plans to offer Petitioner's NAUGLES Products.

ANSWER:

Interrogatory No. 9:

Identify the territorial areas in the United States where Petitioner plans to manufacture Petitioner's NAUGLES Products.

ANSWER:

Interrogatory No. 10:

Identify the channels of trade through which Petitioner plans to offer Petitioner's NAUGLES Products.

ANSWER:

Interrogatory No. 11:

Identify the representative outlets through which Petitioner plans to offer Petitioner's NAUGLES Products.

ANSWER:

Interrogatory No. 12:

Identify the target market to which Petitioner plans to offer Petitioner's NAUGLES Products.

ANSWER:

Interrogatory No. 13:

Identify the target customer base to which Petitioner plans to offer Petitioner's NAUGLES Products.

ANSWER:

Interrogatory No. 14:

Identify all sources of funding to finance Petitioner's NAUGLES Products.

ANSWER:

Interrogatory No. 15:

Identify the marketing channels through which Petitioner plans to promote Petitioner's NAUGLES Products.

ANSWER:

DOCUMENT REQUESTS

1. All documents and things which refer to Petitioner's creation and selection of Petitioner's NAUGLES Mark.
2. All documents and things which refer to Petitioner's decision to apply to register Petitioner's NAUGLES Mark with the United States Patent and Trademark Office.
3. All documents and things which refer to any clearance searches Petitioner performed for Petitioner's NAUGLES Mark.

4. All documents and things evidencing Petitioner's current use of Petitioner's NAUGLES Mark.

5. All documents and things evidencing Petitioner's intent to use Petitioner's NAUGLES Mark when Petitioner filed its application with the United States Patent and Trademark Office.

6. All documents and things which refer to any products or services Petitioner offers for sale and/or plans to offer for sale under Petitioner's NAUGLES Mark.

7. All documents and things which refer to any licensing agreements Petitioner has entered into with respect to Petitioner's NAUGLES Mark.

8. All documents and things which refer to the territorial areas in the United States where Petitioner offers or plans to offer Petitioner's NAUGLES Products.

9. All documents and things which refer to the territorial areas in the United States where Petitioner manufactures or plans to manufacture Petitioner's NAUGLES Products.

10. All documents and things which refer to the channels of trade through which Petitioner offers or plans to offer Petitioner's NAUGLES Products.

11. All documents and things which refer to representative outlets through which Petitioner offers or plans to offer Petitioner's NAUGLES Products.

12. All documents and things which refer to representative customers who have or are intended to purchase Petitioner's NAUGLES Products.

13. All documents and things which refer to the target market Petitioner has identified for Petitioner's NAUGLES Products.

14. All documents and things which refer to any source of sponsorship, funding, or other financial support for the creation, distribution, manufacturing, marketing, promotion, and/or sale of Petitioner's NAUGLES Products.

15. All documents and things which refer to Petitioner's present and/or planned marketing plans for Petitioner's NAUGLES Products including, but not limited to specimens of all advertising and promotional materials which relate to or refer to Petitioner's NAUGLES Products.

16. All documents and things from any promotional outlet, including but not limited to, magazines, blogs, newspapers, social media sites, television, radio, catalogues, circulars, leaflets, sales or promotional literature, brochures, bulletins, fliers, signs, sales displays, posters, and/or other materials in which Petitioner's NAUGLES Products have been promoted and/or may be promoted in the future.

17. All documents and things which refer to Petitioner's present and/or planned manufacturing processes and supply chains for Petitioner's NAUGLES Products.

18. All documents and things which refer to Petitioner's current shipping processes and or planned shipping processes for Petitioner's NAUGLES Products.

19. All documents and things which refer to Petitioner's monthly expenditures to date and planned future expenditures with respect to Petitioner's NAUGLES Products.

20. All documents and things which refer to any consumer or market testing Petitioner has received or conducted relating to Petitioner's NAUGLES Products.

21. All documents and things which refer to any consumer or market testing Petitioner has received or conducted relating to Petitioner's NAUGLES Mark.

22. All documents and things, including but not limited to, communications with third parties, social media pages, and blogs which refer to Del Taco, Del Taco's marks, or Del Taco's goods or services.

23. All documents and things, including but not limited to, communications with third parties, social media pages, and blogs which refer to Petitioner's NAUGLES Mark.

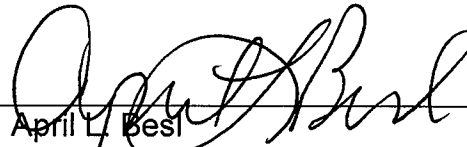
24. All documents and things, including but not limited to, communications with third parties, social media pages, and blogs which refer to Petitioner's NAUGLES Products.

25. All documents and things, including but not limited to, plans, specifications, proposals, correspondence and memoranda, and samples that refer to the design, specifications, packaging, locations, recipes, format, and ingredients for Petitioner's NAUGLES Products.

26. All documents which refer to each and every discussion, correspondence, dispute, controversy, or proceeding of any kind or nature between Petitioner and any third party which involved Petitioner's NAUGLES Mark as applied for or any common law variation thereof.

27. All documents and things on which Petitioner relied in making its allegations contained in Petitioner's PETITION FOR CANCELLATION.

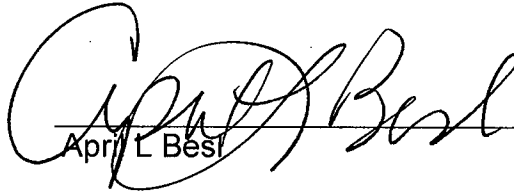
Dated: **April 20, 2011**


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april.besl@dinslaw.com

Attorneys for Respondent
Del Taco LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was sent by email, on this 20th day of April, 2011, to Susan M. Natland and Gregory Phillips, Knobbe Martens Olson & Bear LLP, 2040 Main Street, 14th Floor, Irvine, California 92614, Susan.Natland@kmob.com and Gregory.Phillips@kmob.com.


April L. Besl

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD

CHRISTIAN M. ZIEBARTH,

Petitioner,

vs.

DEL TACO LLC

Respondent.

Reg. No. 1,043,729
Cancellation No. 92053501

RESPONDENT'S FIRST SET
OF REQUESTS FOR ADMISSION TO PETITIONER

In accordance with Rule 36 of the Federal Rules of Civil Procedure and 37 C.F.R. § 2.120, Petitioner is called upon to fully respond to the following Requests for Admissions within thirty (30) days of the date of service.

DEFINITIONS

A. As used herein, the term "Petitioner," "You" and "Your" includes the individual Christian M. Ziebarth and any of his employees, agents, and representatives thereof.

B. As used herein, the term "Registrant" or "Del Taco" includes Del Taco LLC, its predecessors in interest, divisions, subsidiaries and related organizations, and the officers, directors, employees, agents and representatives thereof.

C. As used herein, the term "the Petitioner's NAUGLES Mark" refers to the subject of Application Serial No. 85/040,746 in the name of Christian M. Ziebarth.

D. As used herein, the term "Petitioner's NAUGLES Products" includes those products and services which Petitioner offers for sale or plans to offer for sale under the NAUGLES mark.

INSTRUCTIONS

In responding to each request for admission, Petitioner must either admit or deny the statement, or must provide detailed reasons as to why the statement cannot truthfully be admitted or denied, as required by Rule 36 of the Federal Rules of Civil Procedure. In addition, Registrant is required to explain in detail any qualifications to its responses.

ADMISSION REQUESTS

1. Petitioner is not currently offering any products under Petitioner's NAUGLES Mark.
2. Petitioner has not previously offered any products under Petitioner's NAUGLES Mark.
3. Petitioner is not currently offering any services under Petitioner's NAUGLES Mark.
4. Petitioner has not previously offered any services under Petitioner's NAUGLES Mark.
5. Petitioner was not offering cafeteria and restaurant services under Petitioner's NAUGLES Mark as of May 17, 2010.
6. Petitioner is not currently offering cafeteria and restaurant services under Petitioner's NAUGLES Mark.
7. Petitioner has not entered into any licensing agreements with third parties in connection with Petitioner's NAUGLES Mark.
8. Petitioner has not obtained any loans necessary to finance the manufacturing, sale and distribution of Petitioner's NAUGLES Products.

9. Petitioner has not entered into a partnership to finance the manufacturing, sale and distribution of Petitioner's NAUGLES Products.

10. Petitioner has not raised any funds to finance the manufacturing, sale and distribution of Petitioner's NAUGLES Products.

11. Petitioner has not created any marketing plans for Petitioner's NAUGLES Products.

12. Petitioner has not made any monthly expenditures to date for the purpose of manufacturing or preparing to manufacture Petitioner's NAUGLES Products.

13. Petitioner has not conducted any consumer testing with respect to Petitioner's NAUGLES Products.

14. Petitioner has not conducted any market testing with respect to Petitioner's NAUGLES Products.

15. Petitioner has not conducted any consumer testing with respect to Petitioner's NAUGLES Mark.

16. Petitioner has not conducted any market testing with respect to Petitioner's NAUGLES Mark.

17. Petitioner has not entered into any contracts with third parties for manufacturing of Petitioner's NAUGLES Products.

18. Petitioner has not entered into any contracts with third parties for ingredients to be used in Petitioner's NAUGLES Products.

19. Petitioner has not entered into any contracts with third parties for shipping of Petitioner's NAUGLES Products.

20. Petitioner has not entered into any contracts with third parties for the sale of Petitioner's NAUGLES Products.

21. Petitioner has not entered into any contracts with third parties to operate cafeterias offering Petitioner's NAUGLES Products.

22. Petitioner has not entered into any contracts with third parties to operate restaurants offering Petitioner's NAUGLES Products.

23. Petitioner has not entered into any contracts with third parties for locations where Petitioner's NAUGLES Products will be offered.

24. Petitioner has not entered into any contracts with third parties for marketing of Petitioner's NAUGLES Products.

25. Petitioner has not entered into any negotiations with third parties for manufacturing of Petitioner's NAUGLES Products.

26. Petitioner has not entered into any negotiations with third parties for ingredients to be used in Petitioner's NAUGLES Products.

27. Petitioner has not entered into any negotiations with third parties for shipping of Petitioner's NAUGLES Products.

28. Petitioner has not entered into any negotiations with third parties for the sale of Petitioner's NAUGLES Products.

29. Petitioner has not entered into any negotiations with third parties to operate cafeterias offering Petitioner's NAUGLES Products.

30. Petitioner has not entered into any negotiations with third parties to operate restaurants offering Petitioner's NAUGLES Products.

31. Petitioner has not entered into any negotiations with third parties for locations where Petitioner's NAUGLES Products will be offered.

32. Petitioner has not entered into any negotiations with third parties for marketing of Petitioner's NAUGLES Products.

33. The website located at the domain name <http://www.mexfoodla.com/> is owned by Petitioner.

34. The website located at the domain name <http://www.mexfoodla.com/> is operated by Petitioner.

35. All posts by "ChristianZ" at the domain name <http://www.mexfoodla.com/> are by Petitioner.

36. Petitioner has not discussed Petitioner's NAUGLES Products on <http://www.mexfoodla.com/>.

37. Petitioner has not discussed Petitioner's NAUGLES Mark on <http://www.mexfoodla.com/>.

38. The website located at the domain name <http://ocfoodblogs.blogspot.com/> is owned by Petitioner.

39. The website located at the domain name <http://ocfoodblogs.blogspot.com/> is operated by Petitioner.

40. All posts by "ChristianZ" at the domain name http://ocfoodblogs.blogspot.com are by Petitioner.

41. Petitioner has not discussed Petitioner's NAUGLES Products on http://ocfoodblogs.blogspot.com.

42. Petitioner has not discussed Petitioner's NAUGLES Mark on <http://ocfoodblogs.blogspot.com>.

43. The website located at the domain <http://warmth-of-the-sun.blogspot.com/> is owned by Petitioner.

44. The website located at the domain <http://warmth-of-the-sun.blogspot.com/> is operated by Petitioner.

45. All posts by "ChristianZ" at the domain name <http://warmth-of-the-sun.blogspot.com/> are by Petitioner.

46. Petitioner has not discussed Petitioner's NAUGLES Products on <http://warmth-of-the-sun.blogspot.com/>.

47. Petitioner has not discussed Petitioner's NAUGLES Mark on <http://warmth-of-the-sun.blogspot.com/>.

48. The website located at the domain <http://ocmexfood.blogspot.com/> is owned by Petitioner.

49. The website located at the domain <http://ocmexfood.blogspot.com/> is operated by Petitioner.

50. All posts by "ChristianZ" at the domain name <http://ocmexfood.blogspot.com/> are by Petitioner.

51. Petitioner has not discussed Petitioner's NAUGLES Products on <http://ocmexfood.blogspot.com/>.

52. Petitioner has not discussed Petitioner's NAUGLES Mark on <http://ocmexfood.blogspot.com/>.

53. The website located at the domain <http://www.christianziebarth.com/> is owned by Petitioner.

54. The website located at the domain <http://www.christianziebarth.com/> is operated by Petitioner.

55. All information posted at the domain <http://www.christianziebarth.com/> is posted by Petitioner.

56. Petitioner has not discussed Petitioner's NAUGLES Products on <http://www.christianziebarth.com/>.

57. Petitioner has not discussed Petitioner's NAUGLES Mark on <http://www.christianziebarth.com/>.

58. The Facebook page located at <http://www.facebook.com/ocmexfood?v=wall> is owned by Petitioner.

59. The Facebook page located at <http://www.facebook.com/ocmexfood?v=wall> is operated by Petitioner.

60. All posts under the name "OC Mex Food" on the Facebook page located at <http://www.facebook.com/ocmexfood?v=wall> are by Petitioner.

61. Petitioner has not discussed Petitioner's NAUGLES Products on <http://www.facebook.com/ocmexfood?v=wall>.

62. Petitioner has not discussed Petitioner's NAUGLES Mark on <http://www.facebook.com/ocmexfood?v=wall>.

63. The Twitter page located at <http://twitter.com/#!/cmziebarth> is owned by Petitioner.

64. The Twitter page located at <http://twitter.com/#!/cmziebarth> is operated by Petitioner.

65. All posts under the name “cmziebarth” on <http://twitter.com/#!/cmziebarth> are by Petitioner.

66. Petitioner has not discussed Petitioner’s NAUGLES Products on <http://twitter.com/#!/cmziebarth>.

67. Petitioner has not discussed Petitioner’s NAUGLES Mark on <http://twitter.com/#!/cmziebarth>.

68. Apart from its current NAUGLES application, Petitioner has not applied to register the NAUGLES mark with any governmental entity.

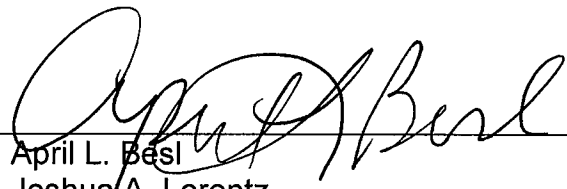
69. Petitioner took the idea for Petitioner’s NAUGLES Products from Registrant.

70. Petitioner was aware of Registrant’s use of the NAUGLES mark prior to filing Petitioner’s NAUGLES Mark with the United States Patent and Trademark Office.

71. Petitioner was aware of Registrant’s registration of the NAUGLES mark prior to filing Petitioner’s NAUGLES Mark with the United States Patent and Trademark Office.

72. Petitioner selected Petitioner’s NAUGLES Mark for Petitioner’s NAUGLES Products with full knowledge of Registrant’s ownership and use of NAUGLES.

Dated: April 20, 2011



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was sent by email, on this 20th day of April, 2011, to Susan M. Natland and Gregory Phillips, Knobbe Martens Olson & Bear LLP, 2040 Main Street, 14th Floor, Irvine, California 92614, Susan.Natland@kmob.com and Gregory.Phillips@kmob.com.



April L. Besl